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6 IN THE UNITED STATES DISTRICT COURT FOR THE  
7 EASTERN DISTRICT OF CALIFORNIA

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9 LION RAISINS, INC., ) No. CV-F-05-0062 REC SMS  
10 Plaintiff, ) ORDER DENYING PLAINTIFF'S  
11 vs. ) MOTION FOR SUMMARY  
12 UNITED STATES DEPARTMENT OF ) JUDGMENT, GRANTING  
AGRICULTURE, ) DEFENDANT'S MOTION FOR  
13 Defendant. ) SUMMARY JUDGMENT, AND  
14 ) DIRECTING CLERK TO ENTER  
15 ) JUDGMENT FOR DEFENDANT.  
16 ) (Docs. 18, 23)  
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19 On September 26, 2005, the Court heard Plaintiff's and  
20 Defendant's cross motions for summary judgment. Upon due  
21 consideration of the written and oral arguments of the parties  
22 and the record herein, the Court GRANTS Defendant's motion and  
23 DENIES Plaintiff's motion as set forth below.

24 **I. Factual Background**

25 This case concerns Freedom of Information Act requests by  
26 Lion Raisins ("Lion") that the United States Department of

1 Agriculture ("USDA") denied, citing ongoing administrative  
2 proceedings against Lion. Lion and USDA have been involved in  
3 administrative proceedings since 1998, when the Agricultural  
4 Marketing Service (hereinafter referred to as "AMS") initiated an  
5 investigation of Lion. The proceedings stem from USDA's  
6 allegations that representatives of Lion forged signatures of  
7 USDA inspectors or recorded false moisture readings on inspection  
8 certificates. USDA alleges that Bruce Lion, an officer and  
9 director of Lion Raisins, instituted a procedure for falsifying  
10 or fabricating USDA certificates to conform to customer  
11 specifications. The fabricated certificates, USDA alleges, were  
12 then sent to foreign customers.

13 On January 12, 2001, USDA suspended Lion's eligibility for  
14 government contracts and filed an administrative complaint (I&G  
15 Docket Number 01-0001) that sought to "debar" future inspections  
16 of Lion's facilities. As of August 10, 2005, ten weeks of  
17 hearings had been held in that case, and USDA had finished  
18 presenting its case in chief. More hearings are scheduled. Two  
19 additional administrative complaints (I&G Docket Numbers 03-0001  
20 and 04-0001) have issued against Lion.

21 Lion is the largest independent handler of raisins produced  
22 in California. It handles and packs raisins produced by outside  
23 growers and by Lion and its affiliates. Lion is governed by the  
24 Agricultural Marketing Act of 1937 (7 U.S.C. §§ 601-627) and a  
25 "marketing order" promulgated thereunder that governs raisins  
26 produced from grapes grown in California (7 C.F.R. §§ 989.1-

1 989.801). The marketing order calls for an inspection process  
2 whereby a handler must have USDA inspect its products once when  
3 they are received from the producer and again before they are  
4 sold to the producer. 7 C.F.R. §§ 989.58-989.59. The AMS is  
5 charged with the administration of the inspection regulations and  
6 provides inspection and grading services to applicants. The  
7 inspections entail USDA inspectors periodically taking samples  
8 from handlers' processing lines to assess the quality of the  
9 raisins in various categories, such as weight, color, size, sugar  
10 content, and moisture.

11 The inspection process generates a variety of paperwork. A  
12 USDA inspector completes a "Line Check Sheet" based on his or her  
13 observations and assigns grades to the raisins. The inspector  
14 then prepares a Certificate of Quality and Condition for Raisins  
15 Worksheet ("Worksheet") that serves as a draft for the official  
16 Certificate of Quality and Condition ("Official Certificate"),  
17 also known as form FV-146, and gives the Worksheet to an employee  
18 of the packer. At Lion the Worksheet was given to a shipping  
19 department employee. The employee's task was to type the  
20 Official Certificate based on the information on the Worksheet.  
21 The employee next returned the Official Certificate and Worksheet  
22 to the USDA grader. If the grader reviewed the Official  
23 Certificate and determined that it had been correctly prepared,  
24 the grader would sign it and return only the original and up to  
25 four carbon copies of the Official Certificate to Lion. USDA did  
26 not return the Worksheets to Lion. From time to time, USDA

1 officials inspecting Lion's raisins would void an Official  
2 Certificate and have a new one typed up. USDA then provided a  
3 copy of the new Official Certificate to Lion. USDA retained the  
4 voided Official Certificate ("Voided Certificate") and did not at  
5 that time provide a copy to Lion.

6 On May 13, 2004, Maralee Berling sent a letter to USDA  
7 requesting under FOIA "any and all Void or Voided USDA  
8 Certificates, also known as USDA form FV-146 prepared for Lion  
9 Raisins, Inc., or Lion Enterprises, Inc." for the period  
10 "beginning January 1995 to December 2000." Trykowski Decl. Ex.  
11 A. USDA's FOIA Officer Zipora D. Bullard refused Lion's request  
12 in a letter of June 23, 2004, on the grounds that the documents  
13 were being withheld pursuant to 5 U.S.C. § 552(b) (7) (A) as  
14 evidence in USDA's ongoing investigation of Lion. Trykowski  
15 Decl. Ex. B. Lion appealed that decision. Trykowski Decl. Ex.  
16 C. By letter dated February 14, 2005, the AMS Acting  
17 Administrator, Kenneth C. Clayton, responded to Lion's appeal by  
18 reversing Ms. Bullard's initial denial and agreed to release the  
19 requested documents. Trykowski Decl. Ex. D. On February 14,  
20 2005, USDA produced 534 documents "representing the USDA  
21 Certificates of Quality and Condition (form FV-146) which were  
22 voided by USDA personnel at Lion Raisins, Inc. between August 1,  
23 1995 and December 31, 2000." Trykowski Decl. ¶ 12. Lion has not  
24 disputed USDA's contention that USDA has satisfied Lion's  
25 request.

26 In a letter dated May 13, 2004, Lion then requested, under

1 FOIA, any and all USDA Certificate of Quality and Condition for  
2 Raisins Worksheets issued or prepared by USDA for product  
3 inspected at Lion during the period of January 1995 to December  
4 2000. Trykowski Decl. Ex. E. By letter dated June 23, 2004, Ms.  
5 Bullard again responded to Lion's request by withholding the  
6 requested documents pursuant to 5 U.S.C. § 552(b) (7) (A).  
7 Trykowski Decl. Ex. F. In its letter dated July 12, 2004, Lion  
8 again appealed. Trykowski Decl. Ex. G. By letter dated January  
9 3, 2005, Mr. Clayton responded to Lion's appeal by upholding Ms.  
10 Bullard's initial refusal to release the requested documents.  
11 Trykowski Decl. Ex. H at 1.

12 **II. Procedural History**

13 Lion filed the instant complaint in federal court on January  
14 11, 2005. Lion alleges that FOIA, 5 U.S.C. § 552, requires USDA  
15 to provide the Voided Certificates and Worksheets that it  
16 requested for the period from January 1995 to December 2000.  
17 Lion seeks a declaratory judgment that USDA improperly refused to  
18 provide the documents, an injunction that requires USDA to  
19 produce the documents, and attorney fees and costs.

20 USDA filed a motion for summary judgment on August 10, 2005.  
21 Lion filed a motion for summary judgment on August 11, 2005.

22 **III. Discussion**

23 **A. Legal Standard**

24 Summary judgment is proper when it is shown that there  
25 exists "no genuine issue as to any material fact and that the  
26 moving party is entitled to judgment as a matter of law." Fed.

1 R. Civ. P. 56. A fact is "material" if it is relevant to an  
2 element of a claim or a defense, the existence of which may  
3 affect the outcome of the suit. T.W. Elec. Serv., Inc. v. Pac.  
4 Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)  
5 (citing Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.,  
6 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)).  
7 Materiality is determined by the substantive law governing a  
8 claim or a defense. Id. The evidence and all inferences drawn  
9 from it must be construed in the light most favorable to the  
10 nonmoving party. Id.

11 The initial burden in a motion for summary judgment is on  
12 the moving party. The moving party satisfies this initial burden  
13 by identifying the parts of the materials on file it believes  
14 demonstrate an "absence of evidence to support the nonmoving  
15 party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91  
16 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The burden then shifts to  
17 the nonmoving party to defeat summary judgment. T.W. Elec., 809  
18 F.2d at 630. Where a court decides cross motions for summary  
19 judgment, neither party is entitled to summary judgment if a  
20 genuine issue exists as to any material fact. United States v.  
21 Fred A. Arnold, Inc., 573 F.2d 605, 606 (9th Cir. 1978) (citing  
22 Fed. R. Civ. P. 56(c)).

23 The nonmoving party "may not rely on the mere allegations in  
24 the pleadings in order to preclude summary judgment," but must  
25 set forth by affidavit or other appropriate evidence "specific  
26 facts showing there is a genuine issue for trial." T.W. Elec.,

1 809 F.2d at 630 (citing Fed. R. Civ. P. 56(e)). The nonmoving  
2 party may not simply state that it will discredit the moving  
3 party's evidence at trial; it must produce at least some  
4 "significant probative evidence tending to support the  
5 complaint." Id. (citing First Nat'l Bank v. Cities Serv. Co.,  
6 391 U.S. 253, 290, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)).

7 A district court may grant summary judgment in FOIA cases  
8 "solely on the basis of government affidavits describing the  
9 documents sought." Lion Raisins, Inc. v. USDA (Lion I), 354 F.3d  
10 1072, 1092 (9th Cir. 2004). Despite the agency's burden in such  
11 cases, a district court can grant summary judgment in the  
12 agency's favor where accurate affidavits given in good faith  
13 adequately state the grounds for nondisclosure:

14 The federal courts and federal judges are  
15 ill-suited to assume the role of  
16 super-administrator in FOIA cases. A court's  
17 primary role, therefore, is to review the  
18 adequacy of the affidavits and other evidence  
19 presented by the Government in support of its  
20 position, utilizing an *in camera* examination  
21 of the manual itself as an aid in determining  
22 whether the Government's affidavits are  
23 accurate and made in good faith. If the  
24 Government fairly describes the content of  
25 the material withheld and adequately states  
its grounds for nondisclosure, and if those  
grounds are reasonable and consistent with  
the applicable law, the district court should  
uphold the Government's position. The court  
is entitled to accept the credibility of the  
affidavits, so long as it has no reason to  
question the good faith of the agency. See  
Weissman v. CIA, [565 F.2d 692, 698 (D.C.  
Cir. 1977)]. If, on the other hand, the  
agency is unable adequately to support its  
decision to withhold portions of the manual,

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1 the court must release that material.<sup>1</sup>  
2 Cox v. United States Dep't of Justice, 576 F.2d 1302, 1312 (8th  
3 Cir. 1978). "In evaluating a claim for exemption, a district  
4 court must accord 'substantial weight' to [agency] affidavits,  
5 provided the justifications for nondisclosure 'are not  
6 controverted by contrary evidence in the record or by evidence of  
7 [agency] bad faith.'" Minier v. CIA, 88 F.3d 796, 800 (9th Cir.  
8 1996).

## B. USDA's Motion for Summary Judgment

10 FOIA generally requires government agencies to fully  
11 disclose to the public information they possess. 5 U.S.C.  
12 § 552(a)(3)(A); see Dep't of the Air Force v. Rose, 425 U.S. 352,  
13 360-61, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976). FOIA evinces "'a  
14 general philosophy of full agency disclosure unless information  
15 is exempted under clearly delineated statutory language.'" Id.  
16 Courts narrowly construe the exclusive exceptions to compelled  
17 disclosure set forth in 5 U.S.C. § 552(b). Rose, 425 U.S. at  
18 361. The burden is on the agency to sustain its action. 5  
19 U.S.C. § 552(a)(4)(B).

20 Under the law enforcement exemption, 5 U.S.C.

22       <sup>1</sup>Ordinarily, the government agency must compile a detailed  
23 index that categorizes the documents withheld. See Lion I, 354  
24 F.3d at 1082 (citing Vaughn v. Rosen, 484 F.2d 820, 823-23 (D.C.  
25 Cir. 1973)). The court also has discretion to review the requested  
26 documents *in camera* to determine whether the agency's claims of  
interference are warranted. See Lewis v. IRS, 823 F.2d 375, 378  
(9th Cir. 1987). Neither party has requested that the Court  
require an index of the withheld documents or review them *in  
camera*, so the Court declines to do so.

1 § 552(b) (7) (A), an agency need not disclose "records or  
2 information compiled for law enforcement purposes, but only to  
3 the extent that the production of such law enforcement records or  
4 information (A) could reasonably be expected to interfere with  
5 enforcement proceedings . . ." Therefore, exemption 7(A) does  
6 not apply unless both of two elements are met: (1) the matter  
7 must be "records or information compiled for law enforcement  
8 purposes," and (2) its release must "reasonably be expected to  
9 interfere with enforcement proceedings."

10 **1. Voided Certificates**

11 Lion's complaint seeks declaratory and injunctive relief  
12 requiring USDA to provide all Voided Certificates that USDA  
13 retained concerning inspections from January 1995 to December  
14 2000. USDA claims that it has responded to Lion's request by  
15 producing 543 documents representing Voided Certificates for the  
16 period August 1, 1995, to December 31, 2000. Def.'s Statement of  
17 Undisputed Material Facts ("UMF") No. 12. Lion does not dispute  
18 this contention. See Pl.'s Opp'n to UMF. The Court accordingly  
19 accepts this contention as true. See Mendelsohn v. Capital  
20 Underwriters, Inc., 490 F. Supp. 1069, 1081 (N.D. Cal. 1979)  
21 ("[U]ndisputed statements contained in the moving party's  
22 affidavits are taken as true." (citing Mut. Fund Investors, Inc.  
23 v. Putnam Mgmt. Co., 553 F.2d 620, 624 (9th Cir. 1977))).

24 USDA has complied with Lion's FOIA request for Voided  
25 Certificates. Accordingly, summary judgment in favor of USDA as  
26 to this issue is GRANTED.

## 2. Worksheets

a. Law Enforcement Purposes

USDA must first establish that the Worksheets are being withheld for law enforcement purposes. This purpose can be shown by affidavits that "establish a rational nexus between enforcement of a federal law and the documents for which the exemption is claimed." Lewis v. IRS, 823 F.2d 375, 379 (9th Cir. 1987). Lion concedes for the purposes of its summary judgment motion "that the Worksheets are records compiled for law enforcement purposes." Pl.'s Mot. at 7. This concession meets USDA's burden to show that the Worksheets satisfy the first requirement of exemption 7(A).

b. Interference with Enforcement Proceedings

This motion turns on the issue of whether USDA has met its burden to show that disclosure of the Worksheets can "reasonably be expected to interfere with enforcement proceedings." The Supreme Court has held that providing earlier access to the government's case can constitute interference with an enforcement proceeding:

In short, prehearing disclosure of witnesses' statements would involve the kind of harm that Congress believed would constitute an "interference" with NLRB enforcement proceedings: that of giving a party litigant earlier and greater access to the Board's case than he would otherwise have. As the lower courts have noted, even without intimidation or harassment a suspected violator with advance access to the Board's case could "'construct defenses which would permit violations to go unremedied.'"

1     NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 241-43, 57 L.  
2     Ed. 2d 159, 98 S. Ct. 2311 (1978). The Court applied exemption  
3     7(A) based on its "reluctance to override a long tradition of  
4     agency discovery." Id. at 239. The Court further noted that  
5     "FOIA was not intended to function as a private discovery tool."  
6     Id. at 242.

7           Lion contends, citing Miller v. USDA, 13 F.3d 260, 263 (8th  
8     Cir. 1993), that USDA can only prevail if it introduces "specific  
9     facts" that "show the distinct harm that could result from  
10    disclosure." Pl.'s Mot. at 3. Lion misreads Miller. Miller  
11    makes no mention of "distinct harm" or "specific facts." See  
12    Miller, 13 F.3d at 263. In that case, the court merely held that  
13    the agency was required to make a "more specific showing" than  
14    the boilerplate, conclusory affidavits it had filed. Id. All  
15    that is required of the agency is a "general showing that  
16    disclosure of its investigatory records would interfere with its  
17    enforcement proceedings." Lewis, 823 F.2d at 380 (citing Robbins  
18    Tire & Rubber Co., 437 U.S. at 224-25). The Supreme Court, after  
19    reviewing FOIA's legislative history, refused to require a  
20    detailed, particularized showing, concluding "that Congress did  
21    not intend to prevent the federal courts from determining that,  
22    with respect to particular kinds of enforcement proceedings,  
23    disclosure of particular kinds of investigatory records while a  
24    case is pending would generally 'interfere with enforcement  
25    proceedings.'" Robbins Tire & Rubber Co., 437 U.S. at 236. The  
26    Ninth Circuit requires that refusal to disclose shall not be

1 predicated on "speculative and farfetched" law enforcement  
2 concerns. Lion I, 354 F.3d at 1085.

3 USDA points out that USDA's civil enforcement proceedings do  
4 not allow Lion to conduct full discovery. Trykowski Decl. ¶ 20;  
5 see 7 C.F.R. §§ 1.140-1.141. USDA contends that Lion is  
6 attempting to circumvent the agency discovery rules with this  
7 FOIA request. USDA further claims that Lion has altered  
8 "[n]umerous USDA documents found in Lion's shipping files."  
9 Trykowski Decl. ¶ 22. USDA contends that Lion seeks the  
10 Worksheets that USDA is withholding because

11 [t]he scope of the fraud committed by Lion is  
12 on such a wide scale that Lion's own  
13 employees lack the ability to recognize  
14 fraudulent documents in Lion's own files.  
15 The only way Lion can possibly identify the  
16 documents it falsified is to obtain every  
17 document on file with the USDA that pertains  
18 to inspections of raisins conducted at Lion  
19 for the period of 1995 to 2000. (Trykowski  
20 Decl., ¶22).

21 Def.'s Mot. at 7.

22 On June 24, 2002, Lion introduced at the administrative  
23 hearing a copy of a purported Official Certificate from its own  
24 shipping files during its cross examination of a USDA grader.  
25 Trykowski Decl. ¶ 23. David Trykowski, Chief of Investigations  
26 for the Compliance Office of the AMS, recognized that the  
document had been falsified but was not yet part of the  
government's evidence in the case. Trykowski Decl. ¶ 23.  
As a result, USDA subsequently amended its administrative  
complaint to allege that Lion had committed additional

1 violations. Trykowski Decl. ¶ 23.

2 USDA further alleges that disclosing the Worksheets  
3 would allow Lion to create exculpatory evidence. USDA points to  
4 its formal allegations that Lion has "long history of creating  
5 documentary 'evidence' to support its position." Trykowski Decl.  
6 ¶ 24. The Trykowski declaration indicates that "[t]he  
7 administrative hearing record is replete with evidence supporting  
8 those allegations." Trykowski Decl. ¶ 24. Mr. Trykowski also  
9 believes that Lion fabricated "minutes of board of directors'  
10 meetings" attached to its reply brief in the first administrative  
11 proceeding to support its case. Trykowski Decl. ¶ 25. Lion  
12 could use the Worksheets, Mr. Trykowski states, "as templates for  
13 the fabrication of 'exculpatory documents.'" Trykowski Decl.  
14 ¶ 26.

15 Lion argues generally that USDA's written responses to its  
16 FOIA requests do not sufficiently specify the harm that could  
17 result from disclosure. Lion errs to the extent that it urges  
18 the Court to limit its decision about whether a FOIA exemption  
19 applies to the reasons given in USDA's initial denial letters.  
20 Lion cites no authority so limiting the Court's inquiry. In  
21 fact, courts may decide a motion for summary judgment on a FOIA  
22 claim based on agency affidavits specifying why the documents  
23 requested meet a FOIA exemption. Lion I, 354 F.3d at 1082. A  
24 district court makes this determination *de novo*. Robbins Tire &  
25 Rubber Co., 437 U.S. at 235.

26 Lion argues that the Worksheets cannot reasonably be

1 expected to interfere with any enforcement proceeding because 1)  
2 the Worksheets are identical to materials Lion already possesses,  
3 2) there is no risk that Lion will use the Worksheets to  
4 fabricate evidence, and 3) Lion is already familiar with USDA's  
5 litigation strategy.

6 Lion asserts that disclosure of the Worksheets could not  
7 possibly interfere with the enforcement proceedings because Lion  
8 already has access to all of the information that the Worksheets  
9 contain in the form of other documents. In Lion I, the Ninth  
10 Circuit held that the law enforcement exemption did not apply to  
11 copies of Line Check Sheets that USDA withheld. 354 F.3d at  
12 1085. The court held that USDA had no reason to retain the  
13 original Line Check Sheets because they were "identical" to the  
14 copies it left with Lion. Id. Copies of material that Lion  
15 already possessed could not possibly "allow Lion premature access  
16 to the evidence upon which it intends to rely at trial." Id.

17 Here, the Worksheets are not identical to the Official  
18 Certificates or to any other document that Lion has possessed.  
19 USDA's practice was to collect the Worksheets after it processed  
20 the Official Certificates and not leave a copy of the Worksheets  
21 with Lion. Trykowski Decl. ¶ 16. Lion claims that USDA has  
22 conceded that the Worksheets are "'draft' USDA Certificates"  
23 identical to the Line Check Sheets that Lion already has.<sup>2</sup> Pl.'s

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24  
25 <sup>2</sup>Lion further claims that if the Worksheets contain identical  
26 information to the Line Check Sheets, then they must contain  
exculpatory evidence or USDA would have released them already.  
Pl.'s Mot. at 8. This claim is fallacious. Mr. Trykowski denies

1 Mot. at 8. Though USDA has claimed that the Line Check Sheets  
2 are required to be accurately transferred to the Worksheets, no  
3 materials it has filed before the Court appear to concede that  
4 the two documents are effectively copies of one another. Even  
5 though the Line Check Sheets may generally contain similar  
6 information to the Worksheets from which they were created, they  
7 do not amount to two copies of the same document. In fact, both  
8 parties acknowledge that the outcome of the administrative  
9 proceedings may depend on a determination of how faithfully the  
10 Line Check Sheets correspond to the Worksheets and to the  
11 resulting Official Certificate. Trykowsky Decl. ¶ 17; Pl.'s UMF  
12 No. 13. Consequently, this case is distinguishable from Lion I  
13 because it appears that Lion's only means of obtaining copies of  
14 the Worksheets before the end of the administrative proceedings  
15 is this FOIA request.

16 In response to USDA's claims about fabrication, Lion objects  
17 that any attempt to alter the Worksheets would be futile because  
18 USDA already possesses the entire universe of Worksheets prepared  
19 for Lion. Lion also contends that the Worksheets that USDA  
20 claims Lion fabricated may have resulted from negligent or  
21

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22 that any of the withheld materials are exculpatory. Trykowsky  
23 Decl. ¶¶ 15, 21-22. USDA could withhold this information for  
24 various reasons, such as to prevent premature disclosure of its  
25 case or to prevent Lion from learning which of Lion's own documents  
26 are fraudulent. In any event, the usefulness of the information  
for Lion's defense is irrelevant, so long as the law enforcement  
exemption is met. FOIA is not a tool for second-guessing agency  
discovery practice. See Robbins Tire & Rubber Co., 437 U.S. at  
239.

1 intentional acts of USDA inspectors. One USDA inspector,  
2 Jennifer Brower, has acknowledged that during the inspection  
3 process it was not uncommon that she "whited out" an incorrect  
4 grade on a Worksheet and wrote in the correct grade, rather than  
5 typing out a new Worksheet on a computer. McBrearty Decl. Ex. 6  
6 at 3. Lion questions the trustworthiness of the Worksheets by  
7 pointing out that USDA failed to sign all of the Worksheets USDA  
8 introduced at the administrative hearing. Pl.'s UMF No. 15.  
9 Lion claims that the lack of a signature makes the Worksheets  
10 "potentially fraudulent." Pl.'s Mot. at 5. Lion argued at oral  
11 argument that the Worksheets are necessary to counter USDA's  
12 assertions that an "absence of entry" in certain records is  
13 evidence of Lion's misconduct. Lion contends that the Worksheets  
14 will show that the absences actually result from USDA's willful  
15 or negligent conduct.

16 Lion's assertions that it cannot be "reasonably expected"  
17 that Lion will fraudulently alter the copies of the Worksheets or  
18 use them as a template for fabrication if they are disclosed are  
19 persuasive. USDA has only made conclusory secondhand averments  
20 to this effect that derive from the yet unfinished administrative  
21 hearings on the subject. See Trykowski Decl. ¶¶ 15-17, 22, 24.  
22 The Court agrees that it is unlikely that Lion will now try to  
23 extricate itself from these accusations of fraudulent fabrication  
24 by fabricating more documents directly under the nose of USDA.  
25 Thus, USDA has not shown that the likelihood of fabrication,  
26 taken alone, makes it such that we can reasonably expect the

1 Worksheets to interfere with the administrative proceedings.

2 To rebut USDA's claims that disclosing the Worksheets would  
3 reveal its litigation strategy, Lion points out that the  
4 Worksheets were prepared long before the administrative  
5 proceedings began and so cannot reveal anything about USDA's  
6 strategy in later proceedings. USDA has completed its case in  
7 chief in the first of three administrative actions, which means  
8 that any litigation strategy has already been revealed, according  
9 to Lion. Lion also asserts that future debarment proceedings  
10 will be similar to the first. Pl.'s Mot. at 8. Lion argued for  
11 the first time at oral argument that, based on its knowledge of  
12 the Official Certificates, it already is aware of the contents of  
13 the Worksheets.

14 Lion persuasively argues that it already knows a great deal  
15 about USDA's litigation strategy. USDA has already presented its  
16 case in the first proceeding. Neither party has informed the  
17 Court about the nature of the other pending administrative  
18 hearings, except that the second concerns "additional violations  
19 of the AMA and the inspection and certification regulations" and  
20 the third addresses "further violations of the AMA and the  
21 inspection and certification regulations." Trykowsky Decl. ¶ 14.  
22 Thus, for the purpose of deciding USDA's motion we will view the  
23 evidence in the light most favorable to Lion and presume that  
24 USDA's case in the forthcoming proceedings will be similar to the  
25 first. See Matsushita, 475 U.S. 574.

26 Even if the upcoming proceedings are similar, however,

1 Lion's greater access to the evidence against it may still  
2 interfere with them. Lion is likely to be better able to present  
3 its defense knowing what evidence USDA has available for rebuttal  
4 and cross examination. USDA's claim that Lion will be able to  
5 present a more effective defense using the documents is  
6 convincing. Lion's introduction, on June 24, 2002, of a  
7 falsified Official Certificate during cross examination lends  
8 credence to USDA's claim that, if Lion has fabricated documents,  
9 it currently lacks information about its past fabrication. This  
10 incident also belies Lion's assertion that its knowledge of  
11 Official Certificates provides all the information it needs to  
12 determine what information other inspection-related documents  
13 ought to contain. Disclosure of the Worksheets would provide the  
14 "earlier and greater access" that constitutes an interference  
15 with enforcement proceedings. Robbins Tire & Rubber Co., 437  
16 U.S. at 241; see also Mapother v. Dep't of Justice, 3 F.3d 1533,  
17 1542 (D.C. Cir. 1993) (holding that a document met exemption 7(A)  
18 where the agency alleged that disclosure "'would allow possible  
19 fabrication of alibis and/or other exculpatory evidence, contact  
20 with potential witnesses, and would allow the identification of  
21 any weaknesses in the government's evidence that may be unfairly  
22 exploited by Waldheim.'")

23 Lion has not given the Court a satisfactory basis to  
24 disregard Mr. Trykowski's statement about the falsified Official  
25 Certificate it introduced. In its briefs, Lion made boilerplate  
26 objections to other portions of Mr. Trykowski's affidavit on the

1 grounds that they were unreliable expert opinion under Federal  
2 Rule of Evidence 702. See, e.g., Pl.'s Objs. to Evidence No. 1.  
3 In fact, Lion applies that objection to each one of its  
4 evidentiary objections except for the objection that applies to  
5 the introduction of the fabricated Official Certificate, which it  
6 objects to only on relevance grounds. Pl.'s Objs. to Evidence  
7 No. 7. Lion objected for the first time at oral argument that  
8 Mr. Trykowski's affidavit is conclusory and lacks a factual  
9 basis.

10 Lion is correct that Mr. Trykowski gives no specific facts  
11 underlying his opinion that the Official Certificate had been  
12 fabricated. See Trykowski Decl. ¶ 23. Expert opinions need not,  
13 however, disclose the factual foundation on which they are based.  
14 See Mid-State Fertilizer Co. v. Exch. Nat'l Bank, 877 F.2d 1333,  
15 1339 (7th Cir. 1989) ("Rule 705 of the Federal Rules of Evidence  
16 allows experts to present naked opinions."). Lion provides no  
17 reason to doubt Mr. Trykowski's opinion about the document's  
18 authenticity. Nor did Lion give any reason to doubt Mr.  
19 Trykowski's expertise as an investigator or his ability to  
20 identify falsified documents.<sup>3</sup>

21 In any event, Lion does not dispute Mr. Trykowski's opinion  
22 that the document it introduced at the proceedings was fabricated  
23 and makes no effort to explain its origin. Consequently, the  
24

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25 <sup>3</sup> Mr. Trykowski has worked since 1995 in an investigative  
26 capacity with AMS and has over thirty years total investigative  
experience. Trykowski Decl. ¶ 1.

1 Court will deem that statement admitted. See Mendelsohn, 490 F.  
2 Supp. at 1081.

3 Lion's introduction of a falsified document, the origin of  
4 which it cannot explain, combined with USDA's ongoing  
5 administrative proceedings, establishes that in this kind of  
6 enforcement proceeding, this kind of evidence would "generally  
7 'interfere with enforcement proceedings.'" See Robbins Tire &  
8 Rubber Co., 437 U.S. at 236. While USDA has not proven as a  
9 matter of law that Lion has fabricated or even is likely to  
10 fabricate any documents if the Worksheets are disclosed, it need  
11 not make any such a showing. USDA need not prove its entire case  
12 against Lion in order to withhold the Worksheets. All it must do  
13 is show the existence of a law enforcement proceeding and that  
14 the withheld documents "could reasonably be expected to  
15 interfere" with that proceeding. Lion I, 354 F.3d at 1072.

16 USDA's concern about expected interference with enforcement  
17 is not merely "a speculative and farfetched concern." See Lion  
18 I, 354 F.3d at 1085. It is uncontroverted that Lion introduced a  
19 fabricated Official Certificate that triggered additional  
20 administrative complaints. Lion has failed to advance an  
21 innocent explanation for the introduction of the document. Lion  
22 has also failed respond to USDA's concerns that disclosing the  
23 Worksheets would help Lion to discover which of its documents, if  
24 any, are falsified. The Worksheets will undoubtedly help Lion  
25 determine which of its own documents differ from those held by  
26 USDA. By comparing its files to the withheld Worksheets, Lion

1 could likely better structure its defense to avoid liability that  
2 would inevitably stem from future accidental disclosure of  
3 falsified documents.

4 The undisputed material facts and the USDA's affidavits meet  
5 the government's burden to show that the law enforcement  
6 exemption is met. The disclosure of the Worksheets can  
7 "reasonably be expected to interfere with enforcement  
8 proceedings." Accordingly, summary judgment in favor of USDA as  
9 to this issue is GRANTED.

10 **C. Lion's Motion for Summary Judgment**

11 For the reasons stated above, Lion's motion for summary  
12 judgment is DENIED.

13 **ACCORDINGLY:**

14 1. Defendant's motion for summary judgment is hereby  
15 GRANTED and Plaintiff's motion for summary judgment is hereby  
16 DENIED.

17 2. JUDGMENT FOR DEFENDANT TO BE GRANTED.

18

19

20 IT IS SO ORDERED.

21 **Dated: October 19, 2005**  
22 810ha4

23 **/s/ Robert E. Coyle**  
24 UNITED STATES DISTRICT JUDGE

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